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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. RAYMOND MCCLENDON, Defendant and Appellant.	B186582 (Los Angeles County Super. Ct. No. GA053740)

APPEAL from a judgment of the Superior Court for the County of Los Angeles. Lisa B. Lench, Judge. Affirmed.

Edward H. Schulman, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Mary Sanchez and Richard S. Moskowitz, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Raymond McClendon appeals from the judgment of conviction of multiple counts of lewd acts upon a child under the age of 14 years, possession of child pornography, and sending harmful matter with intent to seduce a child.[1] He contends the trial court erred in (1) denying his request to substitute retained counsel for previously retained counsel; (2) excluding certain testimony by a defense expert witness; and (3) giving CALJIC No. 2.50.01. He also contends he received ineffective assistance of counsel. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Viewed in accordance with the usual rules on appeal (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), the evidence adduced at trial established that in April 2002, nine-year-old C.C. lived with his mother, his mother's fiancé, Milo; and his five-year-old half-sister, M.M.[2] The mother described their home life as "volatile;" Milo was quick to anger and C.C., who had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD), often got in trouble. As a result, the mother's stress level was very high. In April or May of that year, the mother brought C.C. with her to a laundromat. There, they met defendant for the first time. Defendant introduced himself as "Cory" and said he had a recently deceased son who was a lot like C.C. Defendant gave C.C. money to play video games and was very attentive to him. The mother and defendant exchanged telephone numbers. The next weekend, the mother made arrangements for C.C. to wash defendant's truck as a way of paying him back for the videogame money; on this occasion, defendant obtained the mother's permission to take C.C. to the races. The

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[1] Defendant was charged by information with nine counts of lewd act with a child under the age of 14, one count of sending harmful matter, and five counts of possession of child pornography; prior convictions were alleged pursuant to a number sentence enhancement statutes. An amended information deleted two of the lewd act counts and added allegations of various sentencing factors in accordance with *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).

[2] C.C. was 12 years old when he testified at trial.

mother thought defendant was very nice and that it would be a good thing for C.C. to receive from defendant the positive attention she believed her fiancé was not giving him. Defendant would sometimes pick C.C. up from school and take him to the movies, Irwindale Speedway, amusement parks, or swimming at a hotel. Defendant bought C.C. toys and clothes. C.C. seemed to like spending time with defendant, and the mother trusted defendant because he always brought C.C. home at the appointed time.

The mother began having doubts when defendant started arguing with her about taking C.C. places. In September 2002, defendant left a message on the mother's answering machine threatening to blow up her house if she did not accede to his wishes concerning C.C. This caused the mother to consult an attorney and obtain a restraining order against defendant. Defendant was hurt and angry about the restraining order and tried to convince the mother to allow him to continue seeing C.C.

On September 26, 2002, about three or four days after the mother's last conversation with defendant, she was contacted by someone from the sheriff's department who instructed her to bring C.C. into the station; after C.C. was interviewed, the mother learned for the first time that C.C. had been molested by defendant. Subsequently, the mother received "dozens and dozens" of letters from defendant in which defendant professed his love for the mother and C.C., urged her to allow him talk to her "in person" about what had happened with C.C., and requested that the mother send him pictures of the mother and C.C. Defendant also addressed numerous letters to C.C., but the mother did not give them to C.C. She gave all of the letters to the police.

At trial, C.C. described various incidents of molestation by defendant. He also recalled multiple occasions on which defendant showed him pornographic pictures on a computer. One time, defendant brought C.C. to a hotel room and showed him a pornographic video before molesting him.[3] C.C. recalled that when he was interviewed at the sheriff's station, the detective told him that defendant had molested 19 other children and that defendant could go to jail for life.

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3 Defendant was employed cleaning carpets at a hotel.

Detective Charles Ansberry of the Los Angeles Sheriff's Department recalled interviewing C.C. at the sheriff's station. When Ansberry subsequently interviewed defendant, defendant admitted that investigators would find child pornography on his computer. In response to Ansberry's inquiry about C.C., defendant described three incidents in which he claimed C.C. made sexual advances towards defendant. When defendant referred to C.C.'s "sexual awakening," Ansberry recognized the term as one used by the North American Man Boy Love Association (NAMBLA), which is an organization that advocates for sexual contact between adult men and young boys. Ansberry opined that it is not unusual for persons who molest children to begin by showing the child pornography for the purpose of desensitizing the child and "then you will frequently suggest to the person you're showing it to about how much fun it looks. Don't those people look like they're having fun? You can go from there, hey, why don't we try that? [¶] And then basically you can use pictures as a how to manual, if you will, as to the acts that you want to become involved in."

Officer Alexander More testified that, in the context of his assignment to the computer crimes unit of the Los Angeles Police Department, he did an analysis of defendant's computer looking for child pornography and internet history. More found over 200 images of child pornography, 13 child pornography videos, and an extensive history of visits to child pornography websites.

Testifying as an expert for the defense, Mohan Nair, an assistant clinical professor of child psychiatry at UCLA, opined that, because C.C. had been diagnosed with a learning disorder, ADHD and oppositional disorder, he was "susceptible to suggestibility," which means he easily was influenced to believe things happened that did not actually happen.

The jury convicted defendant as charged except for one lewd act (mistrial declared). In a bifurcated proceeding, the trial court found true the prior conviction and *Blakely* sentencing factor allegations. After denying defendant's motion for new trial, the trial court sentenced him to a total of 480 years to life in prison.

Defendant filed a timely notice of appeal.

DISCUSSION

1. *Denial of Defendant's Motion to Substitute Retained Counsel Did Not Result In a Denial of Due Process*

Defendant contends he was denied due process as a result of the trial court's denial of his motion to substitute retained attorney Laurence Donoghue for retained attorney Richard Pintal.[4] He argues that Pintal's "history of unpreparedness in this case, his admitted 'personal problems' which, as of April 5, 2005 put him, by his own admission, at least 6 weeks behind in preparing for trial, his need to search out, for the first time on April 5th a child neuropsychologist and a neuropharmacologist, and his expressed uncertainty as to which of several defense experts he had consulted or intended to utilize at trial, it should have been apparent to both Judge Schwartz and Judge Lench that Pintal was ill prepared to try this case." We find no error.

A criminal defendant has a due process right to appear and defend with retained counsel of his own choice. But this right is not absolute. It must be balanced against any disruption flowing from the substitution. (*People v. Lara* (2001) 86 Cal.App.4th 139, 153; *People v. Turner* (1992) 7 Cal.App.4th 913, 919.) Trial courts have discretion to deny a request to substitute counsel upon a finding that the defendant has been " 'unjustifiably dilatory or . . . arbitrarily desires to substitute counsel at the time of trial.' [Citation.]" (*People v. Leonard* (2000) 78 Cal.App.4th 776, 784, citing *People v. Ortiz* (1990) 51 Cal.3d 975, 983.) In *People v. Courts* (1985) 37 Cal.3d 784 (*Courts*), our Supreme Court explained that the right to new counsel " 'can constitutionally be forced to yield *only* when it will result in significant prejudice to the defendant himself or in a disruption of the orderly processes of justice unreasonable under the circumstances of the particular case.' [Citations.]" (*Id*. at p. 790, italics in original.)

A request for a trial continuance that is linked to an assertion of the right to retained counsel should be accommodated " 'to the fullest extent consistent with effective

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[4] Donoghue's name is spelled differently throughout the record, but we use the spelling used by Donoghue when he signed the new trial motion.

judicial administration.' [Citation.]" (*Courts, supra*, 37 Cal.3d at p. 791.) But, even where a continuance request is linked to a request to substitute counsel, the defendant has the burden of showing good cause for a continuance under Penal Code section 1050, subdivision (e).[5] (*People v. Smithey* (1999) 20 Cal.4th 936, 1011.) In deciding whether the denial of a continuance linked to a request to substitute counsel was so arbitrary as to violate due process, we look to the circumstances of the case, particularly the reasons given at the time the request is denied. (*Courts, supra*, at p. 791.)

Here, the relevant circumstances included the fact that, because the victim was a minor, the case had trial priority. (§ 1048, subd. (b)(1); see also § 1050, subd. (a) [recognizing victim's right to an expeditious disposition of the case and trial court's concomitant duty to expedite the proceedings "to the greatest degree that is consistent with ends of justice."].)[6] Pintal represented defendant at his arraignment on August 6, 2003. The initial May 17, 2004, trial date was continued a number of times, often at Pintal's request. After defendant's discovery motion was denied on February 23, 2005, a trial date of April 4, 2005, was set. On that date, Pintal filed a motion to continue the trial supported by Pintal's affidavit; because defendant was a miss-out, hearing on the motion was continued to the next day.

At the April 5th hearing, Pintal explained to Judge Leslie Brown that, as a result of the "personal medication situation" which he described in his affidavit, he was not prepared to go to trial in two weeks (the matter was then day 1 of 15). Pintal said he needed four to five weeks to "catch up," including interviewing experts in addition to the

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5 All future undesignated statutory references are to the Penal Code.

6 Pursuant to section 1048, subdivision (b)(1), any case where the alleged victim is a minor "shall be given precedence over all other criminal actions in the order of trial. In those actions, continuations shall be granted by the court only after a hearing and determination of the necessity thereof, and in any event, the trial shall be commenced within 30 days after arraignment, unless for good cause the court shall direct the action to be continued, after a hearing and determination of the necessity of the continuance, and states the findings for a determination of good cause on the record.")

two he had already interviewed. Pintal stated: "There very might be a motion to withdraw, which is something that I don't want to do. I am representing to the court as an officer of the court that two weeks time I am going to be physically, not legally or logistically or anything, physically unable to do what I need to do. [¶] . . . [¶] In two weeks time." He concluded: "The most important and primary issue with respect to my defense is that the previous approximately five weeks, I have not been able to finish what I need to finish and get everything that exists and there's a substantial amount that exists to the appropriate experts, plural. And in the span of two weeks it cannot logistically be done and I believe that's where the 6th Amendment issue is most prominent." The prosecutor opposed another continuance on the grounds, among others, that the repeated continuances were a hardship on the child-victim.

Finding Pintal had failed to establish good cause for another continuance, Judge Brown denied the motion and transferred the matter to Department E for trial. In Department E that same day, Judge Teri Schwartz, said the matter would be called on April 12, 2005. Although defendant now knew his retained counsel was not prepared to go to trial immediately and the trial court had denied a continuance, defendant did not indicate to either Judge Brown or Judge Schwartz that he had in any way lost confidence in Pintal or was considering hiring new counsel.

Several more continuances followed, until Friday, April 29, 2005, when defendant indicated for the first time that he wanted to substitute Donoghue for Pintal. But Donoghue, who apparently had been present in court the day before when the hearing was continued, was not present that day. Judge Schwartz informed defendant that he would not relieve Pintal "until someone comes in and says they're ready to start trial. Your request is not timely. This case is pretty old and we're 9 of 10 today. So it's too little, too late in my opinion. But if you have somebody coming in who's going to be ready to start on Monday, I'll permit the substitution. Otherwise, I will not." After defendant agreed to a continuance to May 2, 2005, as day 7 of 10 to have his substitution motion heard, Judge Schwartz transferred the matter to Judge Lench in Department W.

On May 3, 2005, four weeks and one day after Pintal's request for a four to five week continuance had been denied, both Pintal and Donoghue were present when defendant argued his motion to have Pintal replaced by Donoghue. Defendant explained: "I feel that Mr. Pintal has neglected to represent my crucial and best interest in this case. [¶] Due to the last second, there isn't investigated, that would be crucial to my defense, lack of communication, minimum issues, that we discussed at an ex parte motion. I don't feel confident. [¶] This is a huge, huge matter to my life and there are some things that need to be checked out and investigated and established before my defense can be presented." But Pintal, who a month earlier had stated that he could not be ready for trial in two weeks, answered affirmatively when Judge Lench asked whether he was prepared to start trial that day.[7] Donoghue, however, stated that he was not prepared to do so. The prosecutor continued to oppose another continuance because of the hardship to the child-victim. Judge Lench denied defendant's substitution motion, observing: "I do not believe a motion for substitution of private counsel is appropriately made. I don't believe it's timely. [¶] Mr. Donoghue is not prepared to go to trial at this time. [¶] This case is ready to proceed to trial. Mr. Pintal has been representing the defendant for at least a year. [¶] It doesn't appear that the defendant's motion for substitution of privately retained counsel is timely and I'm going to deny the motion." Oral argument on the parties' pre-trial motions followed and jury selection began the next day.

We find no abuse of discretion in the trial court's denial of defendant's motion to substitute retained counsel. The case, which under section 1048, subdivision (b)(1) had priority, was already more than a year old and the trial date had been continued a number of times during the preceding year. As the trial court indicated, defendant's substitution request was made the day trial was scheduled to begin. Although Pintal had been unready to start trial a month previously, he and the prosecutor both announced ready the day defendant made his motion. New counsel, however, was not ready to start trial.

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[7] Nothing in the record supports appellate counsel's statement, at oral argument, that Pintal was being untruthful when he announced ready.

Since allowing defendant to substitute counsel at that late stage would have resulted in disruption of the orderly process of justice, the trial court acted within its discretion in denying the request.

2. *Defendant Was Not Denied the Constitutional Right to Present a Complete Defense*

Defendant contends he was denied due process as a result of the trial court's order sustaining two objections to questions asked of defense expert Nair.[8] He argues that, by sustaining these objections, the trial court precluded Nair from presenting a complete defense. We disagree.

As a general rule, trial courts are afforded wide discretion to admit or exclude expert testimony. (*People v. Page* (1991) 2 Cal.App.4th 161, 187 (*Page*).) But in *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*), the United States Supreme Court held that, notwithstanding the trial court's denial of the defendant's motion to suppress a confession, the blanket exclusion from trial of evidence about the manner in which a defendant's confession was secured deprived the defendant of the right to present a complete defense.

In *Page*, the issue was whether, under *Crane* and the Evidence Code, the trial court improperly restricted a defense expert from testifying to the psychological factors which caused the defendant to give a false confession. The appellate court reasoned that there was no constitutional error because (1) the trial court admitted the expert's testimony regarding the general psychological factors which might lead to an unreliable confession, along with descriptions of supporting experiments, and (2) the excluded testimony – the particular psychological factors present in the defendant's tape recorded statements and the expert's opinion as to the general reliability of the confession – was not indispensable to the defendant's theory of defense. (*Page*, *supra*, 2 Cal.App.4th at

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8 Defendant does not challenge the trial court's ruling on the prosecution's motion in limine to preclude defendant's expert from "presenting irrelevant character evidence from victim's confidential psychiatric records."

pp. 186-187.) Moreover, the appellate court found no abuse of discretion under the Evidence Code, reasoning that expert testimony that informs the jury of certain factors which may affect a witness's perception is properly limited to " 'explaining the potential effects of those circumstances on the powers of observation and recollection of a typical witness.' " (*Id*. at p. 188.) Defendant argues that, under *Crane*, he was denied the right to present a complete defense and that *Page* is distinguishable. We disagree.

Here, Nair testified that, in addition to being a general psychiatrist, she also had board certification as a child psychiatrist, forensic psychiatrist, addiction medicine specialist and clinical psycho-pharmacologist. Between her personal practice and her duties supervising others, she estimated that she had evaluated thousands of children who had made accusations of molestation. Nair's testimony covered three general subjects: (1) the phenomenon of "suggestibility;" (2) proper interview techniques to avoid suggestibility in child molestation cases; and (3) whether C.C. was suggestible and how his interview contributed to that suggestibility. Nair testified as follows:

- *Suggestibility* – The phenomenon of "suggestibility" in child molestation cases occurs when "what a person thinks, believes and speaks about may be influenced by others, including coming to believe things that didn't happen or making – misconstruing things . . . or to either completely falsely or somewhat falsely, based on how others have influenced a person's memories and thinking." The influence can come from any source, particularly parents and other authority figures. As a result of suggestibility, a child may be led to believe that abuse occurred when it did not occur. People with bad memories and attention problems are more susceptible to suggestibility. As many as one out of three accusations in sexual abuse cases is false as a result of suggestive questioning.
- *Interview Techniques* – The American Psychological Association has suggested guidelines for interviewing children about molestation. These broad rules include (1) avoid leading questions, (2) avoid "loaded" terms that may unconsciously suggest to the child how to answer the question, and (3) video or audio-tape the interview to allow accurate evaluation of the interview. Nair opined that it would

be "suggestive" for an interviewer to tell a child, in the beginning of the interview, that the suspect had molested other children because the child may believe he is expected to say that he, too, had been molested; or, it may cause the child to interpret past events differently, i.e. cause "false memories." It would also be "suggestive" for the interviewer to describe an act and then ask the child if that act occurred. Nair testified that the "contamination process" that begins with a suggestive interview may continue through subsequent interviews and even therapy because the inaccurate memories become reinforced.

- *C.C.* – Nair had never personally interviewed or treated C.C. or defendant. In preparation for her testimony, Nair reviewed trial transcripts, and C.C.'s school and medical records. According to C.C.'s records, he had been diagnosed with ADHD, a specific learning disorder and oppositional disorder. These disorders entailed problems with information processing, short and long term memory, reading comprehension, following directions, sitting still, paying attention, and completing tasks. Nair opined that, because he suffered from these disorders, C.C.'s could have been directly susceptible to suggestibility when he was interviewed by the police in September 2002. Moreover, Nair expressed concern that C.C.'s subsequent therapists may have reinforced this suggestibility by continuing to focus on the alleged molestation. For a child with the disorders C.C. has been diagnosed with, a 90 minute interview would be too long because he would lose concentration. Because of C.C.'s known memory problems, his memory of what happened several years ago is less accurate today.

Defendant quarrels with the trial court's rulings sustaining objections to the following two questions asked of Nair by defense counsel: (1) "In your opinion, doctor, based on the review of those records and the way that therapists are approaching it, would you opine that they are being suggestive in their interviews and discussions with" C.C.? and (2) "[A]re there specific studies that deal with cases where individuals were found to have been falsely accused by minors, based on suggestibility, specific example case studies?" We find no error as to either question.

Like the expert in *Page*, Nair testified extensively about the general psychological factors which might lead to an unreliable accusation under circumstances similar to those present here: suggestibility in general; how interviews can be suggestive; how a child with disorders like C.C.'s is particularly susceptible to suggestibility. Specifically, Nair opined that C.C. was suggestible; that the length of the his first interview and the fact that he was told that defendant had molested other children would have contributed to C.C.'s suggestibility; that subsequent events – treatment by therapists, participation in sex abuse groups – may have reinforced C.C.'s original suggestibility. In light of this evidence, Nair's opinion of whether C.C. was in fact questioned in a manner likely to influence him to respond in a certain way, like the opinion of the expert in *Page* as to whether particular coercive factors were in fact present in the tape recorded interview, was not indispensable to his defense. Accordingly, there was no abuse of discretion in excluding this evidence. (Cf. *Page, supra*, 2 Cal.App.4th at pp. 185-189.)

Likewise, whether there were specific example case studies dealing with false accusations by minors based on suggestibility, was not indispensable to the theory of defense in light of everything else to which Nair testified. (*Page, supra*, 2 Cal.App.4th at pp. 186-187.) Moreover, as the trial court explained when it sustained the objection to this question, the evidence was properly excluded under Evidence Code section 352 because it had the potential to necessitate undue consumption of time or create a substantial danger of confusing the issues by opening up the door to inquiry about the individual case studies.

3. *Ineffective Assistance of Counsel*

Defendant contends he received ineffective assistance of counsel as a result of defense counsel's failure to object and request an admonition when the computer specialist who examined defendant's computer testified: "We conduct our analysis according to the investigating officer and pursuant to whatever court order there is. In this case, I believe it was a parole search order that directed me to conduct my search."

"To succeed on a claim of ineffective assistance of counsel, a '[d]efendant must show that counsel's performance was both deficient and prejudicial, i.e., that it is reasonably probable that counsel's unprofessional errors affected the outcome. [Citations.] . . . [I]f the record sheds no light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for an explanation and failed to provide one, or there could be no satisfactory explanation for counsel's performance. [Citations.]" (*People v. Smithey*, *supra*, 20 Cal.4th at p. 986.) Failure to object rarely constitutes constitutionally ineffective assistance of counsel. (*People v. Huggins* (2006) 38 Cal.4th 175, 252.) Here, defendant has failed to meet his burden.

Regarding the challenged testimony, the following colloquy occurred out of the presence of the jury: "THE COURT: I don't know if there's anything on this computer indicating the defendant's status, but I want to make sure this witness doesn't discuss the defendant's status again. There was a brief reference and I'm not going to get into that. I just want to make sure – I don't believe you elicited that answer. *I waited some time*, and I want to make sure this witness understands not to indicate the defendant's status again." (Italics added.) Although the trial court did not explain its reason for waiting, we understand the trial court's comments to mean that it "waited some time" after the problematic testimony to avoid drawing the jury's attention to it by calling for an immediate side-bar. The record is silent as to why defense counsel failed to object or request an admonition, but it is reasonably likely that he, too, did not want to draw the jury's attention to the witness's fleeting statement. Since this would have been a reasonable tactical choice, defendant has not met his burden of establishing deficient performance. (See e.g. *Huggins*, *supra*, 38 Cal.4th at pp. 252-253.)

4. *CALJIC No. 2.50.01*

Also without merit is defendant's contention that he was denied due process as a result of the giving of CALJIC No. 2.50.01.[9] As defendant acknowledges, the instruction was approved by our Supreme Court in *People v. Reliford* (2003) 29 Cal.4th 1007, 1009-1016, and we are bound to follow that decision by *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

RUBIN, J.

WE CONCUR:

COOPER, P. J.

FLIER, J.

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9 CALJIC No. 2.50.01 instructs about the proper manner of considering evidence that the defendant engaged in uncharged sexual offenses. Here, three witnesses testified that defendant had previously molested them. Since there is no issue on appeal relating to this evidence, it is not necessary to set it forth in detail. Defendant explains that he raises the issue to preserve it for later review. (*People v. Jaramillo* (1993) 20 Cal.App.4th 196, 198.)